No. 15412-15413

United States
COURT OF APPEALS
for the Ninth Circuit

UNDERWRITERS AT LLOYD'S, LONDON, ENGLAND,

Appellant,

vs.

JANE S. LYONS,

Appellee.

GLENS FALLS INDEMNITY CO., a Corporation,

Appellant,

vs.

JANE S. LYONS,

Appellee.

REPLY BRIEF OF APPELLANTS

Upon Appeal from the United States District Court for the District of Oregon.

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SUBJECT INDEX

AUTHORITIES CITED

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REPLY OF APPELLANTS TO RELEVANT OREGON CASES CITED BY APPELLEE

Appellee, at page 35 of her brief, refers to the failure of Appellants to mention to the court two recent decisions of the Supreme Court of Oregon, namely: *Todd v.*

Occidental Life Ins. Co., 62 Or. Adv. Sh. 675, 295 P2d 870 (1956) withdrawn on rehearing, 63 Or. Adv. Sh. 333, 303 P2d 492 (1956), and *LaBarge v. United Ins. Co.,* 63 Or. Adv. Sh. 345, 303 P2d 498 (1956), confirmed on rehearing, 64 Or. Adv. Sh. 81, 306 P2d 380 (1957).

As counsel for the Appellants, we are of course mindful and aware of the above Oregon authorities; however, they were neither cited nor discussed under ground "C," page 48 of Appellants' brief, for the very obvious reason that the question there presented by Appellants is whether there is *any competent substantial evidence* in the record to sustain Appellee's burden of proof and to support the court's finding that the insured's death was not caused or contributed to by disease. It is the position of Appellants, as pointed out in our opening brief, the record fails to disclose any competent substantial evidence.

The *Todd case* and the *LaBarge case* apparently follow what appears to be a generally accepted rule that those infirmities which are generally considered normal to mankind at the various stages of life cannot be considered as a concurring cause of disability.

Certainly the *Todd case* and the *LaBarge case* do not overrule *Hutchison v. Aetna Life Insurance Company,* 182 Or. 639, 189 P2d 586, where the Supreme Court of Oregon considered the same proposition urged by the Appellants in this case; *Was there any substantial evidence* to support a verdict in favor of plaintiff? The court found in the negative and reversed the lower court, thus finding for the defendant insurance carrier.

We believe, and strongly so, that the "opinions" of Dr. Rush and Dr. Chamberlain that the deceased had a "normal heart" are incompetent opinions in that the doctors engaged entirely in speculation and conjecture as to the extent of the involvement of the coronary arteries, namely the reported diminishment of the caliber of the coronary arteries of the deceased from atheromatous deposits (Ex. 15) (R. 266, 271, 312, 445, 487-9). Were the doctors qualified to render an opinion as to the condition of the deceased's heart and *completely ignore the autopsy findings?* We believe not.

Hence the *Todd case* and the *LaBarge case* were not discussed under ground "C," page 48 of Appellants' brief. It is not the purpose of Appellants to burden the court with a repetition of argument and authorities and thus prolong discussion of this point further, as we have attempted to thoroughly present the matter in our opening brief. We did, however, deem it proper and necessary to again raise the point and briefly discuss it with the court in view of the statements of Appellee's brief on page 35 thereof.

REPLY OF APPELLANTS TO OTHER AUTHORITIES CITED BY APPELLEE

With respect to said authorities cited by Appellee in her brief, it appears from a review of the same that they were resolved on the premise of competent medical testimony and, *in addition thereto, other physical evidence of an accident* or mishap having occurred. To support the above remarks Appellants will refer briefly to a few of these cases as follows, and will likewise include the case of *Buckles v. Continental Casualty Co.,* 197 Or. 128, 251 P2d 476, 252 P2d 184 (1952).

(a) In *Preferred Accident Ins. Co. of New York v. Combs,* 76 F2d 775 (CCA 8, 1935), evidence disclosed that there was a statement by the deceased after the accident occurred and before his death that he *slipped and fell,* and the autopsy report which was in evidence and taken for what it stated showed a hemorrhage at the place where the outside force struck the head.

(b) In *Maryland Casualty Co. v. Stark,* 109 F2d 212, (CCA 9, 1940), it was agreed by the parties that the deceased fell into the water, and the autopsy report which was accepted as to its contents stated that the probable cause of death was *asphyxiation by means of drowning.* The court in its opinion was particularly impressed by the agreed facts that the assured fell into the water, and so stated.

(c) In *Lang v. Metropolitan Life Ins. Co.,* 115 F2d 621 (CCA 7, 1940), all of the doctors who testified participated in an autopsy of the deceased's body, the de-

ceased having fallen forward on his nose and bled profusely. Thus the testimony of those doctors was based on competent and satisfactory evidence and not on speculation and conjecture as in the case at bar.

(d) In *New York Life Insurance Co. v. Hoffman,* 218 F2d 465 (CA 6, 1954), we wish to point out that Appellee, in her comments on this case at page 41 of her brief, fails to point out that in addition to the occlusion which was found in the autopsy in the Hoffman case, and which autopsy was accepted by the medical experts, that the medical opinion was that the deceased in the Hoffman case met his death as a result of a cut which penetrated the outer layer of the larynx allowing entrance of blood into the larynx and a resultant choking to death of the deceased.

(e) In *Buckles v. Continental Casualty Co.,* supra, the autopsy was performed upon the body of the deceased and the vital organs examined by qualified experts and such expert testimony indicated that the death of the deceased *resulted from shock and loss of blood as a result of blows and injuries to the head and body.* In that case the examination of the body disclosed a crushed nose, a gash on the neck on the right side, bruises on the head and arm. Under the scalp and covering the top of the head from the forehead to the back thereof, there was clotted blood from ¼ to ½ inch thick.

It is significant to note that Appellee in her brief fails to discuss the case of *Annereau v. Ewauna Box Co.,* 176 Or. 509, 159 P2d 215, which case is discussed in detail in Appellants' opening brief and which will, for obvious reasons, not be further discussed at this time.

CONCLUSION

In conclusion Appellants reiterate the conclusion set out in their opening brief and wish to answer Appellee's contention that this is a *frivolous* appeal by stating that a review of this case by this Honorable Court could not be urged with more seriousness and honesty, based upon our best research, our study of the record and the authorities cited.

Respectfully submitted,

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